

At the conclusion of the preliminary hearing on December 17, 2002, the Administrative Law Judge (ALJ) referred claimant for a court ordered independent medical examination with Dr. Paul S. Stein on the issue of causation for claimant's thoracic spine problem. Dr. Stein examined claimant on January 17, 2003, and his report was filed on January 22, 2003. Dr. Stein could not state whether or not the thoracic problems were related to the September 2000 incident at work. The ALJ determined that the thoracic spine complaints were related to the accidental injury and authorized Dr. Steven E. Gaede to provide treatment.

Respondent appealed and argues the claimant has failed to establish that either her initial low back injury or her thoracic spine complaints were the result of a work-related injury. Respondent argues the medical evidence establishes claimant was suffering from severe low back pain with radiculopathy prior to her alleged work-related accident and that alleged incident did not aggravate or accelerate that preexisting condition. And respondent notes the medical evidence does not indicate any thoracic spine complaints until approximately two years after the alleged accident.

Claimant argues the medical evidence establishes that claimant's low back and thoracic complaints were caused by her work-related accident and requests the ALJ's Order be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein and the parties briefs, the Board makes the following findings of fact and conclusions of law:

Claimant alleged she injured her back on September 1, 2000, when a lunch table she had squatted down to unlatch had started to fall. Claimant jumped back out of the way and twisted her back. Respondent initially provided claimant with treatment and the parties later entered an agreement that respondent, while not admitting compensability, would provide claimant a list of three health care providers from which claimant could choose the authorized treating physician. Claimant selected Dr. Gaede.

On March 5, 2001, Dr. Gaede performed a laminectomy, decompression, total discectomy with a posterior lumbar interbody fusion and posterolateral fusion with pedicle screws at L5-S1 on claimant's low back. After the surgery claimant noted significant improvement and by May 31, 2001, was walking six miles a day. At her August 9, 2001, office visit claimant reported back pain radiating into the hips and up toward the mid thoracic area. At her October 18, 2001, office visit claimant complained of pain in her hips and tingling in her feet with prolonged standing. Ultimately, Dr. Gaede performed a second surgery on June 24, 2002, to remove the hardware.

At claimant's August 8, 2002, office visit claimant complained of pain at T12-L1. After reviewing an MRI scan Dr. Gaede concluded claimant had T8-9 disk desiccation and left eccentric disk rupture with evidence of nerve root compression that correlate with claimant's pain description. Dr. Gaede opined this condition was present since her injury but was masked by her lumbar pain.

Respondent referred claimant to Dr. Andrew C. John, for examination on November 21, 2002. Dr. John opined that the September 1, 2000, injury did not cause or aggravate claimant's preexisting low back condition. The doctor further noted that there was an absence of complaints of thoracic pain prior to August 2002. Consequently, the

doctor concluded the thoracic back condition developed as a result of claimant's degenerative disk disease which developed while she was off work.

Dr. Stein conducted a court ordered examination of the claimant and noted the medical records indicated claimant had mentioned pain above the lumbar spine on three occasions prior to August 2002. The doctor further noted:

None of these really reflects a complaint of thoracic pain to the extent that she currently has but does indicate symptoms in this area. In the 9/20/00 records there is also a pain drawing by the patient which shows symptoms up to the lower thoracic region. (It should be noted that review of the report by Dr. John suggests that he did not have medical records related to two out of these three instances, which might account for his statement that "there is no indication that she ever complained of any pain in her midthoracic area".) It is sometimes the case that there are two areas of pain but one so far overshadows the other in intensity that the second is not much attended to at the time. Counterbalancing this assumption is the lack of such complaint in all of the other medical transcripts and especially, in Dr. Gaede's records of April and May, 2001, when the patient had good relief of the lumbosacral pain. If the thoracic disk herniation was present and symptomatic one would have expected notice at this time, when the predominant lower back pain had improved after surgery.

Dr. Stein concluded he could not state within a reasonable degree of medical probability that herniation of the T8-9 disk either did or did not occur as a result of the incident at work in September 2000.

In summation, claimant testified that her low back condition worsened as a result of the work-related incident on September 1, 2000. Dr. John P. Estivo reviewed the records of claimant's preexisting back problem and concluded that claimant's work activities as well as the incident on September 1, 2000, aggravated claimant's preexisting condition. Dr. Gaede also concluded claimant's lower back complaints were the result of her work-related incident. The Board concludes claimant has met her burden of proof to establish that her lower back condition was aggravated by the work-related incident on September 1, 2000.

Dr. Gaede also concluded claimant's thoracic spine condition had been present since the September 1, 2000, work-related incident but that condition had been masked by the predominant lumbar spine pain. The difficulty with this position is pointed out by Dr. Stein that when claimant initially had good relief from her lumbosacral pain after her first back surgery, she did not complain of thoracic pain. And Dr. Stein further noted that there were only three mentions of thoracic pain in all of the other medical records compiled during the intervening two years after the September 1, 2000, incident at work. Moreover, Dr. Stein opined that the symptoms complained of on one of the occasions was not completely explainable by a T8-9 disk protrusion and on another occasion claimant indicated pain was radiating up from the lower back up toward the lower thoracic region.

After claimant's first surgery, she noted significant improvement in her lower back pain and her condition improved to the point she was walking six miles a day. The Board concludes that the failure to complain of pain during this time period refutes Dr. Gaede's opinion that the lumbosacral pain had masked the thoracic condition. Consequently, the Board concludes claimant has not met her burden of proof to establish that her thoracic complaints were work-related. The ALJ's Order finding claimant's thoracic spine injury was work-related and ordering medical treatment with Dr. Gaede is reversed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.¹

AWARD

WHEREFORE, it is the finding, of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated April 10, 2003, is reversed.

IT IS SO ORDERED.

Dated this _____ day of June 2003.

BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹ K.S.A. 44-534a(a)(2).